

functions of the agency, including whether the information will have practical utility;

- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submissions of responses.

A copy of the proposed information collection request can be obtained by contacting the employee listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice, or viewed on the Internet by selecting "Rules & Regs", and then selecting "FedReg.Docs". On the next screen, select "Paperwork Reduction Act Supporting Statement" to view documents supporting the **Federal Register** notice.

### III. Current Actions

This notice contains a request for public comment on the extension of the information collection for existing notification, recordkeeping, and reporting provisions for radiation sampling and exposure records. MSHA does not intend to publish the results from this information collection and is not seeking approval to either display or not display the expiration date for the OMB approval of this information collection.

There are no certification exceptions identified with this information collection and the collection of this information does not employ statistical methods.

*Type of Review:* Extension.

*Agency:* Mine Safety and Health Administration.

*OMB Number:* 1219-0003.

*Frequency:* On Occasion.

*Affected Public:* Business or other for-profit.

*Cost to Federal Government:* \$747.

*Total Burden Respondents:* 5.

*Total Number of Responses:* 255.

*Total Burden Hours:* 502 hours.

*Total Hour Burden Cost:* \$17,018.

Comments submitted in response to this notice will be summarized and included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated: December 14, 2010.

**Patricia W. Silvey,**

*Director, Office of Standards, Regulations, and Variances.*

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**BILLING CODE 4510-43-P**

## DEPARTMENT OF LABOR

### Wage and Hour Division

**RIN 1235-ZA00**

#### Reasonable Break Time for Nursing Mothers

**AGENCY:** Wage and Hour Division, United States Department of Labor.

**ACTION:** Request for Information from the public.

**SUMMARY:** This notice is a request for information from the public regarding the recent amendment to the Fair Labor Standards Act (FLSA) that requires employers to provide reasonable break time and a place for nursing mothers to express breast milk for one year after their child's birth. The Department of Labor ("the Department") administers and enforces the FLSA through its Wage and Hour Division. Contained in this notice are the Department's preliminary interpretations of the new break time amendment to the FLSA. The Department seeks information and comments for its review on various issues addressed in this notice, as it considers how best to help employers and employees understand the requirements of the break time for nursing mothers law.

The break time requirement that is now part of the FLSA is set forth in Section 4207 of the Patient Protection and Affordable Care Act, Public Law 111-148 ("Affordable Care Act"). The provision requires employers to provide "reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child's birth each time such employee has need to express the milk." Employers are also required to provide "a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk." See 29 U.S.C. 207(r).

The break time requirement became effective when the Affordable Care Act was signed into law on March 23, 2010. To assist employers with complying with the new law, the Department has issued Wage and Hour Fact Sheet #73: "Break Time for Nursing Mothers under the FLSA" at <http://www.dol.gov/whd/regs/compliance/whdfs73.pdf>. The Department has also posted Frequently

Asked Questions (FAQs) on its Web site that reiterate the information provided in the Fact Sheet in a different format. Until the Department issues final guidance, the Department's enforcement will be based on the statutory language and the guidance provided in WHD Fact Sheet #73 and the associated FAQs.

Employers, employees, and other stakeholders have requested additional guidance from the Department about the law's requirements and the Department wants to provide an opportunity for the public to submit information and comments for its consideration. The Department will consider the information and comments received in response to this Request for Information in formulating further guidance for the regulated community on complying with the new break time requirement. Until any such further guidance is issued, the RFI provides useful information for employers to consider in establishing policies for nursing employees.

At this time, the Department does not plan to issue regulations implementing this provision. Because of the wide variety of workplace environments, work schedules, and individual factors that will impact the number and length of breaks required by a nursing mother, as well as the manner in which an employer complies with break time requirement, the Department believes that regulations may not be the most useful or effective means for providing initial guidance to employers and employees. If, however, based on its experience administering and enforcing the break time requirement and the comments received in response to this Request for Information, the Department determines that regulations are necessary, it will initiate rulemaking at that time.

This Request for Information contains the Department's preliminary interpretations of the law's requirements. The Department's identification of key issues related to the law and the development of this Request for Information have been informed by the Department's meetings and discussions with various stakeholders, including employer organizations and representatives, public health and women's organizations, state agencies that have experience administering state laws concerning workplace lactation, and individuals and businesses that have contacted the Department with questions about the new law. The Department looks forward to continuing to receive input and invites the public to comment on the break time requirement generally and on the

Department's preliminary interpretations in this Request for Information. All comments will be made publicly available.

**DATES:** Comments must be received on or before February 22, 2011.

**ADDRESSES:** You may submit comments identified by RIN 1235-ZA00 by either of the following methods:

*Federal eRulemaking Portal:* <http://www.regulations.gov>. Please follow the instructions for submitting comments.

*Mail:* Comments may be mailed to Montaniel Navarro, U.S. Department of Labor, 200 Constitution Avenue, NW., Room S-3502, Washington, DC 20210.

Please submit only one copy of your comments by only one method. All submissions must include the agency name and Regulatory Information Number (RIN) identified above for this request for information. All comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided.

**FOR FURTHER INFORMATION CONTACT:**

Montaniel Navarro, FLSA Branch Chief, Wage and Hour Division, U.S. Department of Labor, 200 Constitution Avenue, NW., Room S-3502, Washington, DC 20210, (202) 693-0051.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

The Patient Protection and Affordable Care Act (the "Affordable Care Act") amended section 7 of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. 207, to require employers to provide nursing mothers reasonable break time and a place to express breast milk. Public Law 111-148, 124 Stat. 119, section 4207. The new requirement became effective when the President signed the Affordable Care Act on March 23, 2010. The specific requirements of the new provision are described below.

*Break Time*

Employers are required to provide "reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child's birth each time such employee has need to express the milk." 29 U.S.C. 207(r)(1)(A). The law states that "[a]n employer shall not be required to compensate an employee receiving reasonable break time [for expressing breast milk] for any work time spent for such purpose." 29 U.S.C. 207(r)(2).

*Space*

The law further requires employers to provide "a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an

employee to express breast milk." 29 U.S.C. 207(r)(1)(B).

*Undue Hardship Exemption for Employers With Fewer Than 50 Employees*

Under the law, "[a]n employer that employs less than 50 employees shall not be subject to the requirements of this subsection, if such requirements would impose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business." 29 U.S.C. 207(r)(3).

*Relationship to State Laws*

The Federal law does not preempt "a State law that provides greater protections to employees than the protections provided for under [the Federal law]." 29 U.S.C. 207(r)(4).

*Coverage Under the FLSA Nursing Mothers Provision*

As mentioned above, the Affordable Care Act's break time for nursing mothers provision is now part of the FLSA. The FLSA is the Federal law that sets minimum wage, overtime, recordkeeping, and youth employment standards. The break time for nursing mothers provision was added to section 7 of the FLSA, which sets forth premium payment obligations for overtime. The FLSA and the break time for nursing mothers provision apply only to certain employees. First, in order for an employee to be covered by the FLSA, there must be "enterprise coverage" or "individual coverage."

*Enterprise Coverage*

Employees who work for certain businesses or organizations ("enterprises") are covered by the FLSA. These enterprises, which must have at least two employees, are:

- (1) Those that have an annual dollar volume of sales or business done of at least \$500,000; or
- (2) hospitals, businesses providing medical or nursing care for residents, schools and preschools, and government agencies. 29 U.S.C. 203(s)(1).

*Individual Coverage*

Even when there is no enterprise coverage, employees are covered by the FLSA if their work regularly involves them in commerce between states ("interstate commerce"). The FLSA covers individual workers who are "engaged in commerce or in the production of goods for commerce." 29 U.S.C. 206(a), 207(a). Examples of employees who are involved in

interstate commerce include those who: produce goods that will be sent out of state (such as a worker assembling components in a factory or a secretary typing letters in an office), regularly make telephone calls to persons located in other states, handle records of interstate transactions, travel to other states on their jobs, and do janitorial work in buildings where goods are produced for shipment outside the state. Also, domestic service workers such as housekeepers, full-time babysitters, and cooks are typically covered by the FLSA. 29 U.S.C. 202(a).

*Coverage for Nonexempt Employees*

Even if an employee is covered under the FLSA, that employee would only be entitled to break time to express breast milk if she is not exempt from section 7 of the FLSA, which sets forth the Act's overtime pay requirements. Unless specifically exempted, the FLSA requires payment of overtime to covered employees for hours worked in excess of 40 hours per workweek at a rate not less than time and one-half of their regular rates of pay. Because the Affordable Care Act amended section 7 of the FLSA, the break time for nursing mothers provision does not apply to employees who are exempt from the provisions of section 7. While employers are not required under the FLSA to provide breaks to nursing mothers who are exempt from the requirements of section 7, they may be obligated to provide such breaks under state laws. The Department encourages employers to provide break time for all nursing mothers including those who may not be covered under the FLSA or who are exempt from section 7.

**II. Key Issues on Which Public Comment Is Requested**

In this document, the Department shares its preliminary interpretations of the law, and seeks public comment on any and all issues concerning the reasonable break time for nursing mothers law. The Department specifically seeks comment on certain issues and preliminary interpretations, as noted below.

*a. Unpaid Break Time*

Employers are not required to compensate nursing mothers for breaks taken for the purpose of expressing milk. 29 U.S.C. 207(r)(2). The FLSA does not require an employer to provide its employees with rest periods or breaks. However, if the employer permits short breaks, usually 20 minutes or less, the time must be counted as hours worked when determining if the FLSA requirements for payment of

minimum wage and/or overtime have been satisfied. *See* 29 CFR 785.18. Where an employer already provides paid breaks, an employee who uses that break time to express milk must be paid in the same way that other employees are compensated for break time.

Additional time used beyond the authorized paid break time could be uncompensated. For example, if an employer provides a 20 minute paid break and a nursing employee uses that time to express milk and takes a total of 25 minutes for this purpose, the five minutes in excess of the paid break time does not have to be compensated. The FLSA's general requirement that the employee must be completely relieved from duty applies; if a nursing employee is not completely relieved from duty during a break to express breast milk, the time must be compensated as work time. *See* WHD Fact Sheet #22, Hours Worked Under the FLSA at <http://www.dol.gov/whd/regs/compliance/whdfs22.htm>.

Although the FLSA does not require employers to allow employees to extend their workday (*i.e.*, begin work earlier or end work later) to make up for unpaid break time used for expressing milk, the Department encourages employers to provide flexible scheduling for those employees who choose to make up for any unpaid break time.

#### *b. Reasonable Break Time*

Employers must provide "a reasonable break time" for nursing mothers to express breast milk "each time such employee has need to express the milk." 29 U.S.C. 207(r)(1)(A). In implementing the requirements of this provision, employers should consider both the frequency and number of breaks a nursing mother might need and the length of time she will need to express breast milk. The information provided below is intended to help employers in this assessment so that they can develop policies that meet the requirements of the law and make sense for their work environment.

The Department has consulted with public health officials from the U.S. Department of Health and Human Services, including the Centers for Disease Control and Prevention (CDC) and the Health Resources and Services Administration, in order to better understand a nursing mother's physiological needs and to inform our initial determinations regarding the frequency and timing of breaks to express breast milk. The information that follows stems from the guidance provided by the lactation experts at

these public health agencies.<sup>1</sup> The frequency of breaks needed to express breast milk varies depending on factors such as the age of the baby, the number of breast feedings in the baby's normal daily schedule, whether the baby is eating solid food, and other factors. In the early months of life a baby may need as many as 8 to 12 feedings per day. This means that a nursing baby needs food every two to three hours. A nursing mother produces milk on a constant basis. If the baby does not take the milk directly from the mother, it must be removed by a pump about as frequently as the baby usually nurses. If a mother is unable to express breast milk while she is away from her baby, she may experience a drop in her milk supply which could result in her being unable to continue nursing her child. The inability to express milk may also lead to an infection. Depending on the nursing mother's work schedule, it may be that the frequency of breaks needed tracks regular breaks and lunch periods, but this will not always be the case. As the child grows and begins to consume solid foods, typically around six months of age, the frequency of nursing often decreases, and the need for a nursing mother to take breaks to express breast milk may also gradually diminish.

The Department expects that nursing mothers typically will need breaks to express milk two to three times during an eight hour shift. Longer shifts will require additional breaks to express milk.

The length of time necessary to express milk also varies from woman to woman. The act of expressing breast milk alone typically takes about 15 to 20 minutes, but there are many other factors that will determine a reasonable break time. Employers should consider these factors when determining how they will provide both reasonable break time and space for nursing mothers. For example, factors such as the location of the space and the amenities nearby (*e.g.*, proximity to employee's work area, availability of sink for washing, location of refrigerator or personal storage for the milk, *etc.*) can affect the length of break an employee will need to express milk. Some of the factors employers should consider in determining whether the time needed for a nursing employee to express milk is "reasonable" include:

(i) The time it takes to walk to and from the lactation space and the wait, if any, to use the space;

(ii) Whether the employee has to retrieve her pump and other supplies from another location;

(iii) Whether the employee will need to unpack and set up her own pump or if a pump is provided for her;

(iv) The efficiency of the pump used to express milk (employees using different pumps may require more or less time);

(v) Whether there is a sink and running water nearby for the employee to use to wash her hands before pumping and to clean the pump attachments when she is done expressing milk, or what additional steps she will need to take to maintain the cleanliness of the pump attachments;

(vi) The time it takes for the employee to store her milk either in a refrigerator or personal cooler.

Nursing employees are encouraged to discuss with their employers what they expect they will need in terms of frequency and timing of breaks to express milk. Employers are encouraged to discuss with nursing employees the location and availability of space for expressing milk as that will affect the time required for the breaks. These discussions will help employers and employees to develop shared expectations and an understanding of what will constitute "a reasonable break time" and how to incorporate the breaks into the work period.

In assessing the reasonableness of break time provided to a nursing employee, the Department will consider all the steps reasonably necessary to express breast milk, not merely the time required to express the milk itself.

#### *c. Space for Expressing Breast Milk*

The break time for nursing mothers provision requires that covered employers provide "a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk." 29 U.S.C. 207(r)(1)(B). The Department's initial interpretation of the requirement that the space be "shielded from view and free from intrusion" is that it requires employers where practicable to make a room (either private or with partitions for use by multiple nursing employees) available for use by employees taking breaks to express milk. Where it is not practicable for an employer to provide a room, the requirement can be met by creating a space with partitions or curtains. Any windows in the designated room or

<sup>1</sup> See "The Business Case for Breastfeeding: Steps for Creating a Breastfeeding Friendly Workspace", U.S. Department of Health and Human Services, Health Resources and Services Administration (2008), available at <http://www.womenshealth.gov/breastfeeding/government-programs/business-case-for-breastfeeding/index.cfm>.

space should be covered to ensure the space is “shielded from view.” With any space provided for expressing milk, the employer must ensure the employee’s privacy through means such as signs that designate when the space is in use, or a lock on the door.

The employer is not obligated to maintain a permanent, dedicated space for nursing mothers. A space temporarily created or converted into a space for expressing milk or made available when needed by a nursing mother is sufficient provided that the space is shielded from view, and free from intrusion from coworkers and the public.

While a bathroom, even if it offers privacy, does not meet the requirements of the statute, an anteroom or lounge area connected to the bathroom may be sufficient to meet the requirements of the law. For example, if there is a wall with a door separating the lounge area from the bathroom, and if there is a space for nursing mothers within the lounge that is “shielded from view” and “free from intrusion,” this would likely meet the requirements of the law. The Department would appreciate comments on whether and under what circumstances rooms that adjoin bathrooms could be compliant with the law.

Locker rooms that function as changing rooms (*i.e.*, for changing in and out of uniforms) may also be adequate as long as there is a separate space designated within the room for expressing milk that is shielded from view and free from intrusion. The Department does not believe, however, that a locker room where there is not sufficient differentiation between the toilet area and the space reserved for expressing breast milk would meet the requirements of the law because it presents similar health and sanitation concerns as a bathroom. There is concern that locker rooms may not be appropriate because such wet environments are at risk of being contaminated with pathogenic bacteria and have been linked to outbreaks of methicillin-resistant *Staphylococcus aureus* (MRSA). The Department would appreciate comments on whether and under what circumstances locker rooms could be compliant with the law.

Because the statute requires employers to provide break time “each time such employee has need to express the milk,” employers should consider the number of nursing mothers employed and their work schedules to determine the location and number of spaces to designate or create. As described above, the amount of time that is reasonable for a nursing

employee to express milk is dependent in part on her ability to access a suitable space. In order to accommodate significant numbers of nursing mothers, some large employers may choose to include nursing mothers’ rooms in their floor plans and provide a room on multiple floors of their facility or in an on-site health facility. Other employers may provide a large room with privacy screens so that the room may be used simultaneously by several nursing employees. Where the designated space is so far from the employee’s work area as to make it impractical for the employee to take breaks to express milk, or where the number of nursing employees needing to use the space either prevents an employee from taking breaks to express milk or necessitates prolonged waiting time, the Department will not consider the employer to be in compliance with the requirement to provide reasonable break time.

In order to be a functional space “that may be used by an employee to express breast milk,” at a minimum, a space must contain a place for the nursing mother to sit, and a flat surface, other than the floor, on which to place the pump. Ideally, the space will have access to electricity, so that a nursing mother can plug in an electric pump rather than use a pump with battery power. There are a range of additional features that some employers have included when providing spaces for their employees to use to express breast milk, such as sinks within or nearby the room for washing hands and cleaning pump attachments, and refrigerators within or nearby the room for storing expressed milk. While such additional features are not required, the Department notes that their provision may decrease the amount of break time needed by nursing employees to express milk.

The Department interprets an employee’s right to express milk for a nursing child to include the ability to safely store the milk for her child.<sup>2</sup> While employers are not required to provide refrigeration options for nursing mothers for the purpose of storing expressed milk, they must allow a nursing mother to bring a pump and insulated food container to work for expressing and storing the milk and ensure there is a place where she can store the pump and insulated food container while she is at work. This is similar to providing employees with a place to store lunch or meals that they

<sup>2</sup> The CDC Web site contains recommended guidelines for the safe preparation and storage of expressed breast milk. See <http://www.cdc.gov/breastfeeding/recommendations/handling-breastmilk.htm>.

bring to work in insulated food containers. In many workplaces the nursing mother will be able to keep the pump and insulated container near her work space, but in some settings it may be necessary to have a separate place for her to stow the pump and insulated food container (*e.g.*, a locker, closet, cabinet, or other space where the pump and container will not be disturbed or contaminated).

The Department is aware that there are many work settings that are not in office buildings, and that this can pose unique challenges to providing an adequate space for nursing mothers to express milk. For example, there are nursing employees who work in retail settings, quick service food stores and restaurants, construction or outdoor work sites, factories, or in other non-office building settings. Some of these workplaces may have limited space available to convert into a designated space to express breast milk. In order to meet the obligations of the law, employers need not create a permanent, dedicated space for expressing milk.

The Department is aware that many such employers have found ways to provide break time and space for nursing employees even though there was no readily available “unused” space. For example, in restaurants and small retail settings, employers have made spaces normally designated for other purposes available when needed by the nursing mother. Malls or retail shopping centers have designated shared space to be used by employees of the various tenant businesses. The Department would appreciate comments that address the conditions under which spaces such as manager’s offices, storage spaces, utility closets, and other such spaces normally used for other purposes could be considered adequate spaces for use by nursing mothers under the statute. In addition, the Department solicits comments on the kinds of shared space arrangements that would be acceptable under the law.

Similarly, the Department would appreciate comments that address how employers can provide adequate break time and space for nursing employees who are not in a fixed place during a work shift (*e.g.*, bus drivers, mail or parcel delivery workers, law enforcement officers, emergency medical technicians, *etc.*). In general, the Department would appreciate comments that describe creative solutions to providing break time and space for nursing mothers so that we can share these examples more broadly.

Employers have also asked the Department what their obligation is to provide a space when their nursing

employee is located at a client's worksite, rather than the employer's worksite. It is the Department's view that the statutory language makes it the obligation of the employer to provide the space, regardless of where the employee is located. In situations where the employee is off-site, the Department recommends that the employer arrange with the client to allow the employee to use a space at the client's site for the purpose of expressing milk. It may be that the client's worksite already has a designated space for expressing milk for its own employees that can be used by the contract employee. Where a joint employment relationship exists between the employer and client in relation to the nursing employee, both parties would be viewed as having the obligation to provide reasonable break time and an appropriate space in which to express milk. The Department would appreciate comments and recommendations as to how employers can meet their obligations under the law to provide break time and space for nursing mother employees who are working at other sites.

#### *d. Notice*

In order to facilitate an employer's ability to provide appropriate space for expressing milk, the Department encourages nursing employees to give employers advance notice of their intent to take breaks at work to express milk. The Department believes that a simple conversation between an employee and a supervisor, manager, or human resources representative about the employee's intent to take breaks for the purpose of expressing breast milk would facilitate an employer's ability to make arrangements to comply with the law before the nursing mother returns to work. The Department solicits comments about how best to address notice issues consistent with the language and purpose of the law, bearing in mind that the employer must provide the break time and lactation space "each time such employee has need to express the milk." 29 U.S.C. 207(r)(1)(A).

The Department notes that an employer may ask an expectant mother if she intends to take breaks to express milk while at work. Doing so informs employees of their rights under the law and allows the employer the opportunity to make any necessary adjustments to comply with the law.

#### *e. Undue Hardship Exemption*

The break time for nursing mothers statutory provision provides an undue hardship exemption that is only available for employers with fewer than

50 employees that meet certain conditions, as further described below. Employers with 50 or more employees must comply with the law without exception. 29 U.S.C. 207(r)(3). Unlike the Family Medical Leave Act, in which Congress specifically excluded from coverage worksites where an employer employs less than 50 employees or where the total number of employees employed by that employer within 75 miles of a particular worksite is less than 50 employees, Congress did not provide such specifications for determining the application of the break time for nursing mothers provision to small employers or worksites with few employees. The statutory language of section 7(r)(3) sets forth the number of employees without further specifications such as the number of employees per worksite, or in a geographic area, for example. Therefore, the Department has concluded that covered employers must count all employees who work for the employer, including all work sites, when determining whether this exemption might apply.

Because the nursing mothers break time requirements were added to the FLSA, the Department will apply the FLSA definition of "employee" in section 3(e)(1) when counting employees. Thus, "any individual employed by an employer" must be counted, including full-time employees, part-time employees, and any other individuals who meet the FLSA definition of an employee.

In addition, the Department intends to use the FLSA workweek standard for purposes of counting whether the employer has fewer than 50 employees. See 29 CFR 778.105. The Department recognizes that some employers' workforces fluctuate from week to week, and that some businesses experience variation in workforce size over the course of time, for myriad reasons. However, the Department believes it is necessary to fix the workweek at which the number of employees are counted for purposes of the undue hardship exemption because a nursing mother necessarily relies on the availability of the breaks, and fluctuation in the ability to express breast milk at work may cause the woman to lose the ability to produce sufficient milk for her child, frustrating the purpose of the law. The Department solicits comments as to the appropriate point at which to count the number of employees for purposes of determining whether the employer may assert an undue hardship defense. The Department is considering whether the number of employees should be counted in the workweek in which the employee

notifies the employer that she intends to take breaks to express milk, in the first workweek the employee intends to utilize the breaks and the space to express milk at work, or at some other point. Further, the Department believes that an employer that has previously claimed the undue hardship exemption will no longer be eligible for the exemption if the number of employees employed by the employer rises to 50 or more at the point determined above. The Department solicits comments on this interpretation as well.

The employer bears the burden of proof that compliance with the nursing mothers break time provision would be an undue hardship. In addition to demonstrating that the employer employs fewer than 50 employees, an employer that wishes to avail itself of the exemption must show that compliance would cause the employer "significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business." 29 U.S.C. 207(r)(3). Because these factors and the number of employees employed by a particular employer will vary depending on the circumstances at the time the request for break time is made, the Department will not grant prospective undue hardship exemptions to employers. The undue hardship exemption will operate as an affirmative defense raised by an employer that seeks to demonstrate to the Department why it is unable to accommodate a particular nursing employee under the law. For example, if the Department were investigating a complaint made by a nursing mother who claims her employer is not complying with the law, the employer would have an opportunity at that time to demonstrate to the Department why it qualifies in that instance for an undue hardship exemption based on the statutory factors.

Because the law only requires space and time for unpaid breaks for one year after a child's birth, and the employer must be able to demonstrate "significant" difficulty or expense, the Department believes that this is a stringent standard that will result in employers being able to avail themselves of the exemption only in limited circumstances. Employers with fewer than 50 employees may not presume that having a smaller workforce by itself sufficiently demonstrates that compliance would pose a significant difficulty or expense; the difficulty or expense must be shown in light of the factors listed in the statute. The Department expects and encourages such small employers to

approach compliance creatively and constructively, and will evaluate each undue hardship claim by applying the statutory factors to the particular factual circumstances of a case. The Department solicits comments on whether this undue hardship standard, which is very similar to the undue hardship standard in the Americans With Disabilities Act, 42 U.S.C. 12111(10) ("significant difficulty or expense" when considered in light of factors such as financial resources, size, type of operation and workforce structure), should be interpreted in the same way the undue hardship defense has been interpreted under that law.

#### *f. Relationship to the Family Medical Leave Act*

The Department has received several inquiries concerning the relationship of the nursing mothers break time provision to the Family Medical Leave Act ("FMLA"). The FMLA entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons. See 29 U.S.C. 2601 *et seq.* Among the qualifying reasons for taking FMLA leave are to care for a newborn child within one year of birth and for the employee's own serious health condition that makes the employee unable to perform the essential functions of his or her job. FMLA protections do not extend to leave taken for reasons not covered by the Act. See WHD Fact Sheet # 28 The Family and Medical Leave Act of 1993 at <http://www.dol.gov/whd/regs/compliance/whdfs28.pdf>.

The Department does not believe that breaks to express breast milk can properly be considered to be FMLA leave or counted against an employee's FMLA leave entitlement. While employees are entitled to take FMLA leave to bond with a newborn child, the Department does not consider expressing milk at work to constitute bonding with or caring for a newborn child. See 29 CFR 825.120. Also, while an eligible employee may take FMLA leave due to her own serious health condition, the Department does not believe that expressing milk will typically be associated with a serious health condition under the FMLA. See 29 CFR 825.113–115.

#### *g. Enforcement*

The Department's Wage and Hour Division (WHD) is charged with administering and enforcing the FLSA, which includes the new break time for nursing mothers provision. The enforcement of the FLSA is carried out by WHD investigators. As the WHD's

authorized representatives, they conduct investigations and gather data on wages, hours, and other employment conditions or practices, in order to determine compliance with the law. 29 U.S.C. 211. Where violations are found, they also may recommend changes in employment practices to bring an employer into compliance.

If an employee would like to file a complaint because she believes her employer has violated the break time for nursing mothers requirement under the FLSA, she should call the toll-free WHD number 1–866–487–9243 and she will be directed to the nearest WHD office for assistance. The WHD Web site at <http://www.dol.gov/wecanhelp/howtofilecomplaint.htm> provides basic information about how to file a complaint and how the WHD will investigate complaints.

To the extent possible, WHD intends to give priority consideration to complaints received by the agency alleging that an employer is failing to provide break time and a space to express milk as required by law to allow expeditious resolution of the matter in order to preserve the employee's ability to continue to breastfeed and express milk for her child.

Section 7(r) of the FLSA does not specify any penalties if an employer is found to have violated the break time for nursing mothers requirement. In most instances, an employee may only bring an action for unpaid minimum wages or unpaid overtime compensation and an additional equal amount in liquidated damages. 29 U.S.C. 216(b). Because employers are not required to compensate employees for break time to express breast milk, in most circumstances there will not be any unpaid minimum wage or overtime compensation associated with the failure to provide such breaks.

If an employer refuses to comply with the requirements of section 7(r), however, the Department may seek injunctive relief in federal district court, and may obtain reinstatement and lost wages for the employee. 29 U.S.C. 217. For example, if an employer terminates a nursing mother employee because she takes breaks to express milk that she is entitled to under the FLSA, or because she has informed her employer that she intends to take breaks to express breast milk, this would be considered a violation of 29 U.S.C. 15(a)(2) (*i.e.*, an unlawful violation of section 7(r)). In such a case, the Department could pursue injunctive relief in federal district court and seek reinstatement and lost wages for the employee. Additionally, if an employee is "discharged or in any other manner

discriminated against" because she has filed a complaint or caused to be instituted any proceeding regarding break time for expressing breast milk, the employee may file a retaliation complaint with the Department or she may file a private cause of action seeking reinstatement, lost wages, and other appropriate remedies. 29 U.S.C. 215(a)(3), 216(b).

If an employer treats employees who take breaks to express breast milk differently than employees who take breaks for other personal reasons, the nursing employee may have a claim for disparate treatment under Title VII of the Civil Rights Act of 1964.<sup>3</sup>

#### *h. Compliance Assistance*

The Department is determining how best to provide assistance to employees as well as to employers seeking to comply with the new break time for nursing mothers requirement. The Department has established a website that provides a compilation of resources that employers, employees, lactation consultants, and other interested stakeholders might find useful as they seek to develop workplace lactation programs. See <http://www.dol.gov/whd/nursingmothers>. We are interested generally in hearing from the public about the kinds of information and resources that would be most helpful to employers and employees as they seek to comply with the requirements of the law and to exercise the break time right provided under the law.

#### *i. Additional Resources*

Employers and employees are encouraged to review information issued by the Department of Health and Human Services (HHS) concerning workplace lactation programs. The Health Resources and Services Administration within HHS has published a resource kit, *The Business Case for Breastfeeding*, which includes materials for management, human resource managers, and others involved in implementing on-site programs for lactation support and may be accessed at <http://www.womenshealth.gov/breastfeeding/government-programs/business-case-for-breastfeeding/index.cfm>. The Centers for Disease Control and Prevention within HHS has a Healthier Worksite Initiative that offers a toolkit to help employers establish a comprehensive lactation support program for nursing mothers at the worksite. The toolkit is available at <http://www.cdc.gov/nccdphp/dnpao/>

<sup>3</sup> The Equal Employment Opportunity Commission (EEOC) should be consulted for further information about Title VII. See <http://www.eeoc.gov>.

[hwi/toolkits/lactation/index.htm](http://hwi/toolkits/lactation/index.htm). Several non-profit organizations and state breastfeeding coalitions also provide resources to help employers develop lactation policies and programs. In addition, employers may wish to review the Equal Employment Opportunity Commission's "Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities" which is available at <http://www.eeoc.gov/policy/docs/caregiving.html>.

### III. Electronic Access

An electronic version of this Request for Information is available on the Internet at <http://www.regulations.gov> and <http://www.dol.gov/whd/nursingmothers>.

Nancy J. Leppink,  
Deputy Administrator, Wage and Hour  
Division.

[FR Doc. 2010-31959 Filed 12-20-10; 8:45 am]

BILLING CODE 4510-27-P

## NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice: (10-162)]

### Notice of Information Collection

**AGENCY:** National Aeronautics and Space Administration (NASA).

**ACTION:** Notice of information collection.

**SUMMARY:** The National Aeronautics and Space Administration, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995 (Pub. L. 104-13, 44 U.S.C. 3506(c)(2)(A)).

**DATES:** All comments should be submitted within 30 calendar days from the date of this publication.

**ADDRESSES:** All comments should be addressed to Lori Parker, National Aeronautics and Space Administration, Washington, DC 20546-0001.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Lori Parker, NASA PRA Officer, NASA Headquarters, 300 E Street, SW., JF000, Washington, DC 20546, (202) 358-1351, [Lori.Parker@nasa.gov](mailto:Lori.Parker@nasa.gov).

**SUPPLEMENTARY INFORMATION:**

### I. Abstract

NASA is requesting a Generic Clearance for data collection to integrate program planning, program accountability, management, and monitoring information pertaining to the NASA's education and outreach efforts. NASA's education and outreach portfolio includes efforts that span various organizational units within NASA.

### II. Method of Collection

Electronic.

### III. Data

*Title:* NASA Education Generic Clearance.

*OMB Number:* 2700-xxxx.

*Type of review:* Regular.

*Affected Public:* Business or other for-profit; not-for-profit institutions; individuals or households.

*Number of Respondents:* 2,236,000.

*Responses per Respondent:* 1.

*Annual Responses:* 2,444,000.

*Hours per Request:* 0.15-.5 hour.

*Annual Burden Hours:* 245,333.

*Frequency of Report:* On occasion, quarterly, semi-annually, annually.

### IV. Request for Comments

*Comments are invited on:* (1) Whether the proposed collection of information is necessary for the proper performance of the functions of NASA, including whether the information collected has practical utility; (2) the accuracy of NASA's estimate of the burden (including hours and cost) of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including automated collection techniques or the use of other forms of information technology.

Comments submitted in response to this notice will be summarized and included in the request for OMB approval of this information collection. They will also become a matter of public record.

Lori Parker,  
NASA PRA Clearance Officer.

[FR Doc. 2010-31955 Filed 12-20-10; 8:45 am]

BILLING CODE 7510-13-P

## NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice: (10-165)]

### Notice of Information Collection

**AGENCY:** National Aeronautics and Space Administration (NASA).

**ACTION:** Notice of information collection.

**SUMMARY:** The National Aeronautics and Space Administration, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995 (Pub. L. 104-13, 44 U.S.C. 3506(c)(2)(A)).

**DATES:** All comments should be submitted within 30 calendar days from the date of this publication.

**ADDRESSES:** All comments should be addressed to Lori Parker, National Aeronautics and Space Administration, Washington, DC 20546-0001.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Lori Parker, NASA PRA Officer, NASA Headquarters, 300 E Street, SW., JF0000, Washington, DC 20546, (202) 358-1351, [Lori.Parker@nasa.gov](mailto:Lori.Parker@nasa.gov).

**SUPPLEMENTARY INFORMATION:**

### I. Abstract

As required in Section 305(b) of the National Aeronautics and Space Act of 1958 and the NASA Supplement to the Federal Acquisition Regulation, NASA R&D contracts require contractor/recipient reporting of new technologies to NASA using NASA eNTRE system for electronic submissions and NASA Form 1679 for paper submissions.

### II. Method of Collection

NASA will utilize a web-base on-line form to collect this information. Approximately 65 per cent of the responses will be collected electronically.

### III. Data

*Title:* AST-Technology Utilization.

*OMB Number:* 2700-0009.

*Type of review:* Regular.

*Affected Public:* Business or other for-profit and not-for profit institutions.

*Estimated Number of Respondents:* 1283.

*Estimated Time per Response:* 1 hour for manual responses and 0.75 hour for electronic responses.

*Estimated Total Annual Burden Hours:* 1075.

*Estimated Total Annual Cost:* \$0.

### IV. Request for Comments

*Comments are invited on:* (1) Whether the proposed collection of information is necessary for the proper performance